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No. 13129

See vol. 2714

United States

COURT OF APPEALS

for the Ninth Circuit

M. C. SCHAEFER,

Appellant,

vs.

SAM MACRI, DON MACRI, JOE MACRI, W. R. McKELVY and CONTINENTAL CASUALTY COMPANY, a Corporation,

Appellees.

BRIEF OF APPELLANT SCHAEFER

Upon Appeal from the United States District Court,
Western District of Washington,
Northern Division.

STEVENS-NESS LAW PUB. CO., PORTLAND 2-52

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JURISDICTION

This is an action by appellant herein against appellees herein alleging damages to appellant by reason of a conspiracy among appellees to damage appellant.

The action was instituted in the United States District Court for the Western District of Washington at Seattle, Washington, and as alleged in appellant's Second Amended Complaint (page 367 of printed Transcript of Record) trial court jurisdiction is based on diversity of citizenship and amount in controversy under Title 28, United States Code, Sec. 1332.

Appellate Court jurisdiction is based upon usual appellate jurisdiction of this court from final orders and judgments in actions at law or suits in equity. Final order dismissing appellant's Second Amended Complaint was entered in the trial court on August 7, 1951 (page 532 of Transcript of Record), and notice of appeal therefrom was filed on September 4, 1951, was designated in Appellant's Designation of Contents of Record on Appeal (pp. 537-538, Transcript of Record), item 21, as one of the documents to be included in the record on appeal and was Certified by Clerk of the trial Court (pages 645 and 652, Transcript of Record) under item No. 82 as part of the record transmitted to the Appellate Court, but through a printing error was not included in the printed copies of Transcript of Record in this Appeal.

STATEMENT OF THE CASE

The sole questions involved in this appeal are:

1. Does the complaint, as amended, state a cause of action?

2. If so, is the action barred by reason of the statute of limitations?

3. Should the Court have granted plaintiff's motion (page 516, Transcript of Record) to file a Supplemental Complaint.

These first two questions are raised in the pleadings in the following manner: The complaint was filed and motions were directed against the complaint on the above points by the several defendants, each appearing separately. At the hearing on these motions, which were consolidated for hearing at one time, appellant herein requested and was granted permission to file an amended complaint.

To the amended complaint similar motions were directed, and the trial judge granted the motions, with leave to appellant herein to file a second amended complaint.

This was done (page 367 of record on appeal) and again similar motions were filed (pages 499 to 503 inc., of Transcript of Record) and the trial judge again signed an order dismissing the second amended complaint (page 532 of Transcript of Record) on the above grounds, but without leave to file a further amended pleading. These orders were therefore a final determination by the trial court and this appeal is taken to determine the propriety of such orders dismissing the second amended complaint.

The third question arose as follows: Shortly prior to the hearings on August 6 and 7, 1951 on the several

Motions to Dismiss directed to the Second Amended Complaint, plaintiff below discovered some strong evidence as to the further involvement of defendant McKelvy with the other defendants. Plaintiff then prepared and filed on 8/6/51 his motion for an Order permitting him to supplement his complaint by adding appropriate allegations as to said defendant McKelvy. Plaintiff also sought permission to supplement the complaint by adding allegations, adding one, B. J. Rask, as a party defendant and alleging certain threats and coercion practiced by him.

At the said hearing on 8/6/51 it was stipulated by all parties that despite lack of proper verification and supporting affidavits the facts set forth in said Motion by plaintiff might be considered by the Court in passing on defendant's Motions for Dismissal.

The Order of Dismissal (page 532, Transcript of Record) recites this stipulation, but the Court, having first found that the Motions to Dismiss should be granted, then cleared the record by denying plaintiff's Motion to file Supplemental Complaint. Should the appellate court reverse the trial court, then the Motion to File Supplemental Complaint should also be granted.

SPECIFICATION OF ERRORS

The District Court erred:

1. In granting the motions of the several defendants who appeared, to dismiss the complaint as amended on

the grounds that it failed to state a cause of action and that the statute of limitations had run, in that it does state a sufficient cause of action and the statute had not run.

2. In denying plaintiff's Motion for Order Permitting Filing of Supplemental Complaint.

ARGUMENT

1. *Summary of Argument.* Appellant's principal contentions may be briefly summarized as follows:

a. The second amended complaint does allege a cause of action for damages by reason of overt acts of the defendants pursuant to a preconceived concerted plan to damage plaintiff and appellant, all as more fully set forth in the Argument.

b. The statute of limitations begins to run from the last overt act; and these last acts were within the statutory period, hence the statute does not run for this action.

c. The material set forth in the Motion for Order Permitting Filing of Supplemental Complaint, having been stipulated as admissible, the motion should be granted if there is a reversal of the trial court's ruling.

2. *Conspiracy—Allegations to Sustain Same.* As a practical matter, little argument is required on the question of whether or not a cause of action is stated. Careful reading of the complaint, in the light of the rules of construction laid down in *Jefferson Hotel vs. Jefferson*

Standard Life Insurance Co., 7 F.R.D. 722; *Terteling vs. P.U.D.,* 8 F.R.D. 210; *Kansas Gas vs. Hastings,* 10 F.R.D. 280, should suffice. In addition, however, appellant cites the further law as follows:

> "Accurately speaking, there is no such thing as a civil action for conspiracy. The action is for damages caused by acts committed pursuant to a formed conspiracy, rather than the conspiracy itself. . . . The gist of the civil action for conspiracy is the act or acts committed in pursuance thereof—the damage—not the conspiracy or the combination. The combination may be of no consequence except as bearing upon rules of evidence or the persons liable. The combination must be shown, however, if, because of a dishonest combination to accomplish some wrongful act the conduct complained of becomes actionable. The essential elements of a criminal or 'civil' conspiracy are the same, except that to sustain a civil action for conspiracy special damages must be proved." (11 Am. Jur., Conspiracy, Sec. 45, pages 577 and 578.)

To the same effect see also: *Calcut vs. Gerig* (CCA 6th), 271 F. 220, 27 A.L.R. 543.

It is not necessary in order to establish that the defendants are co-conspirators, to prove that the conspiracy originated with them or that they met during the process of the concoction of the scheme. (11 Am. Jur., Conspiracy, Sec. 48.)

In *Lyle vs. Haskins,* 168 P. 2d 797, the Supreme Court of the State of Washington held that allegation of a conspiracy and proof thereof by circumstantial evidence is all that can be required and that direct and positive allegation and proof is not required.

Attention is also respectfully drawn to the many authorities cited in Vol 3, A.L.R., Permanent Index covering Volumes 1-175, Conspiracy, Sec. 1, pages 75 and 76.

Looking now at the Second Amended Complaint:

Appellant herein alleged in Par. VI (page 370, Transcript of Record):

> "That defendants and each of them willfully, maliciously and with deliberate intent to injure, damage and defraud plaintiff in his performance of said subcontract and otherwise did unlawfully and in accordance with a preconceived plan confederate together, combine, conspire and agree to cause plaintiff to become financially bankrupt, to cause plaintiff to lose his business and its assets, to ruin plaintiff's business and personal reputation and credit. In furtherance of said willful, intentional conspiracy as aforesaid, defendants engaged in a series of tortious acts continuing from the inception of work by plaintiff under said subcontract dated March 15, 1944, to and including August 18, 1950, said acts consisting in principal part of the following:"

Then followed a series of sub-paragraphs in which plaintiff below alleged the principal acts committed by defendants below in furtherance of said conspiracy, which, for convenience, are briefly summarized, but can be read in full beginning at page 370 of the Transcript of Record.

A. That the defendants Macri intentionally delayed performance and performed in a faulty manner their obligations under the contract between plaintiff and said defendants Macri, all for the purpose of and in fact

causing plaintiff greatly increased cost and unnecessary delay and that the acts of said Macris were joined in by the defendants Philp and Goerig who were silent partners of defendants Macri (but this latter fact was not then known to plaintiff).

B. That on or about July 15, 1944, defendants Macri and defendants Philp and Goerig entered into a fictitious agreement purportedly terminating their joint venture, for the sole purpose of confusing the facts and attempting to deprive plaintiff of a cause of suit against defendants Philp and Goerig.

C. and D. That on or about November 1, 1944, defendant McKelvy became a co-conspirator with the other defendants in that said McKelvy accepted employment by plaintiff below to terminate the contract between plaintiff and said Macris and sue for the reasonable value of the work done, but in fact said McKelvy, after learning all facts about plaintiff below, worked closely with the other defendants (who, unknown to plaintiff, were clients of said McKelvy) and by every possible device (the details of which are set forth) attempted to accomplish the aforesaid ends of said conspiracy and almost succeeded.

F. and G. That just before suit was filed as alleged in sub-paragraph E, defendants caused a suit to be filed in Multnomah County, Oregon, against plaintiff for the sole purpose of tying up his credit and making it financially impossible to prosecute the proposed suit, which did dry up plaintiff's credit, and only by the grace of God and the extreme tenacity of plaintiff was he able

to prosecute his first suit against the Macris and the Continental Casualty Company.

H. Paragraph H goes into great detail to show that the defendants in said first suit abused the judicial processes for the purpose of furtherance of said conspiracy to bankrupt plaintiff and ruin his reputation and credit.

I. Shows how the defendants by crafty language on the draft in settlement of the judgment plaintiff obtained in his first suit attempted to block filing of this suit.

J. Shows how defendant McKelvy attempted to get plaintiff to pay McKelvy a fee for alleged services rendered by McKelvy to plaintiff for the purpose of precluding plaintiff from filing this action.

In Par. VII, plaintiff alleges he suffered special damages by reason of the aforesaid conspiracy and acts done in furtherance thereof.

The web of intrigue, conflicting interests, breaches of trust, intentional misadvice and clearly interrelated activities of all the parties defendant as thus set forth in the complaint are relied on by appellant herein as a sufficient allegation, especially in the light of *Lyle vs. Hoskins,* supra, to state a cause of action for damages by reason of conspiracy between the defendants and acts done in furtherance thereof.

By stipulation (see Order, page 532 of Transcript of Record) it is admitted for the purpose of the Motion to Dismiss that threats were made on plaintiff and intimi-

dation practiced by one, B. J. Rask, in March, 1951, thereby adding to plaintiff's case something more than abuse of litigation and subtle maneuvering by McKelvy.

3. *Statute of Limitations.* State rules as to limitation of action will be applied by the Federal Courts in cases where jurisdiction is based on the diversity of citizenship and amount in controversy. *Moffet vs. Commerce Trust Co.,* 75 F. Supp. 303.

No ruling can be found wherein the Supreme Court of the State of Washington has ruled whether the two-year or the three-year statute of Washington applies to a civil conspiracy action. The matter appears to be one of first instance for this Court to determine.

In any event whether the two or the three year statute applies this action is not barred by the running of the statute of limitations as there were overt acts performed within a few months of the filing of plaintiff's original complaint.

For an exhaustive annotation on the subject of the running of the statute of limitations, see 97 A.L.R. 137, 152, citing numerous decisions of Federal Courts and state courts. The majority rule seems clearly to be that a conspiracy is a continuing offense and the statute does not start to run until the last of the overt acts done in furtherance thereof. This view has been adhered to in this case by Judge Lemmon, see page 259 last paragraph, Transcript of Record.

4. *Motion to File Supplemental Complaint Should Be Allowed.* The material set forth in plaintiff's Motion

for Order Permitting Filing of Supplemental Complaint, having been stipulated by all parties as being before the trial court, should be deemed part of the record and if there is an order entered herein reversing the trial court, then the said motion of plaintiff should be allowed, as the material is of vital significance and has a bearing not only on the matter of conspiracy but also on the Statute of Limitations.

5. *General.* For a proper understanding of this case, appellant respectfully submits that a brief review of the record is needed.

The original complaint (page 3, Transcript of Record) was 8 pages long and at the hearing on the motions of the several defendants to dismiss for failure to state a cause of action and on the grounds that the statute of limitations had run, Judge Bowen presided at the beginning of the hearing. It is quite apparent that he believed a cause of action was stated and that the statute had not run. Attention is respectfully directed to the remarks made by Judge Bowen particularly on page 33, Transcript of Record, where the Judge stated: "My thought is that in view of the facts that it promises to be lengthy in respect to the further arguments and I do not know how long my cold is going to last, I am inclined to feel for that reason that I should ask Judge Lemmon to hear the case. . . ."

Mrs. Curry then asked, "Your Honor means by 'the case' the motion?"

To which Judge Bowen replied, *"I mean the whole case."* (Italics supplied.)

The case was then assigned to Judge Lemmon and from the Transcript of Hearing before Judge Lemmon it is clear that this Judge ruled only that the pleadings were not phrased with the nicety he required and voluminous suggestions were made to help plaintiff reallege his case in a manner sufficient to overcome a motion to dismiss. Thus while the Order of Dismissal was unequivocal, the transcript shows that it in fact was conditional and plaintiff was given leave to amend.

In the opinion by Judge Driver at the conclusion of the hearings on defendants' motion to dismiss the amended complaint (page 361, Transcript of Record, and following) it is again made abundantly clear that the fault lay only in lack of nicety of language, not in lack of merit, and again leave was granted to file a further amended complaint and suggestions were given as to ways in which the material set forth could be rephrased so as to meet the requirements of pleading at least sufficiently to get past a motion to dismiss.

Second Amended Complaint was filed (page 367, Transcript of Record) and Judge Lindberg in his ruling from the bench (page 635, lines 14 ff., Transcript of Record) that the second amended complaint failed to cure the defects pointed out by Judges Lemmon and Driver but gave no reasons for his ruling.

Attention is respectfully drawn to the statements made and the authorities cited by Judge Driver in his opinion in the second full paragraph, page 363, Transcript of Record, to the effect that in passing on a motion to dismiss the complaint should be construed in

the light most favorable to plaintiff and *the motion should not be granted unless under no conceivable factual situation which might be established within the framework of the complaint could any relief be granted to the plaintiff*.

Appellant respectfully submits that while the second amended complaint may not have been worded with the nicety of a Blackstone, it certainly meets the tests of the authorities cited by Judge Driver and this Court should reverse the trial court and permit plaintiff to have his day in court in accordance with those fundamental principles upon which this nation was founded and adherence to which has made it the greatest nation on the face of the earth.